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In the Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, ET AL.,
PETITIONERS

v.

JOHN PATTERSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

Whether Section 703(h) of the Civil Rights Act of 1964 protected petitioners' decision to adopt racially discriminatory lines of employee progression from a timely challenge.

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OPINIONS BELOW

The en banc decision of the court of appeals (App. 135-184) is reported at 634 F.2d 744. The decision of the panel of the court of appeals (App. 112-134) is reported at 586 F.2d 300. The decision of the district court (App. 109-111) is unofficially reported at 18 Fair Empl. Prac. Cas. (BNA) 371. An earlier decision of the court of appeals (App. 70-107) is reported at 535 F.2d 257. Earlier opinions of the district court (App. 2-49, 50-69) are unofficially reported at 11 Fair Empl. Prac. Cas. (BNA) 577 and 8 Fair Empl. Prac. Cas. (BNA) 778.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1980. The petition for a writ of certiorari was filed on January 16, 1981, and granted on June 15, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission and the private respondents brought these actions, which were consolidated for trial in the United States District Court for the Eastern District of Virginia in 1973. Both suits alleged that petitioners' promotion and seniority practices had confined blacks to low-paid, segregated jobs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (App. 2-3).[1]

1. Petitioner American Brands, Inc., and its subsidiary, the American Tobacco Company, operate two plants—the "Virginia branch" and the "Richmond branch"—in Richmond, Virginia. Each branch is divided into a prefabrication department, which blends and prepares tobacco for further processing, and a fabrication department, which manufactures the finished product (App. 16, 75). Petitioner Tobacco Workers' International Union and its affiliate, Local 182, are the collective bargaining agents for hourly-paid production workers at both branches (App. 17).[2]

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[1] "App." refers to the Joint Appendix filed in this Court. "J.A." refers to the Joint Appendix filed in the court of appeals. "Exh. App." refers to the Exhibits Appendix filed in the court of appeals.

[2] The international union was named as a defendant only in the private action (App. 3).

Both the company and the union concede that until at least 1963, they engaged in open race discrimination involving every aspect of employment at the two plants—jobs, cafeterias, lockers, and plant entrances (App. 75). Petitioner union maintained two segregated locals; blacks were represented by all-black Local 216, while whites were represented by all-white Local 182 (App. 19). Black employees were assigned to jobs in the "historically black" prefabrication departments and were generally not assigned to jobs in the "historically white" fabrication departments (App. 77, 78, 33). Jobs in the prefabrication departments pay less than jobs in the fabrication departments (App. 33-34). The small proportion of blacks in the fabrication departments generally held manual labor or cleaning jobs (Exh. App. 46-48; App. 33).

Seniority governed layoffs and promotions (App. 75). Under the seniority system maintained by petitioners until 1963, the prefabrication departments each constituted one seniority unit and the fabrication departments constituted separate seniority units (App. 75). Thus an employee could transfer from one of the predominantly black prefabrication departments to one of the predominantly white fabrication departments only by forfeiting his seniority.

In 1963, petitioners came under pressure from government procurement agencies enforcing the anti-discrimination obligations of government contractors (App. 75; J.A. 202). They dropped departmental seniority; instead, employees forfeited seniority only when they transferred between the Richmond branch and the Virginia branch (App. 75).[3] At the same

[3] The union locals were also merged in 1963, with the 350 members of the black local absorbed into the 1400-member white local. None of the officers of the black local retained his position (J.A. 202-203, 247, 500).

time, however, petitioners stopped using seniority alone to determine who would be promoted. Instead, employees had to apply for openings, and the openings were not posted; employees learned of them only by being canvassed by supervisors (App. 76, 28)—virtually all of whom were white.[4] Promotions were then awarded to the most senior "qualified" employee who applied. The company did not maintain written job descriptions; "qualified" meant that an employee "had filled a particular job before and was, in the opinion of supervisory personnel, familiar with it" (App. 28). Between 1963 and 1968, when this promotions policy was in force, virtually all the vacancies in the fabrication departments were filled by white employees. Many of these employees had less plant seniority than blacks (App. 32). The fabrication departments thus remained predominantly white.[5] The district court held that this promotion

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[4] At the Virginia branch, the first black supervisor was appointed in 1963. By 1969, only three of the 71 supervisory employees were black (App. 34). The first black supervisor at the Richmond branch was appointed in 1966, and by 1969 there remained one black supervisor among a total of approximately 30 supervisory employees (App. 35). Between 1963 and 1969 there appear to have been more than 30, and perhaps more than 40, vacancies in supervisory jobs (compare Exh. App. 130-131 with App. 96).

[5] In the Virginia branch there were 82 blacks in the fabrication department in 1963 and 88 in 1968 (Exh. App. 47). The Virginia branch fabrication department appears to have included approximately 660 employees (see Exh. App. 57). In the Richmond branch there were six blacks in 1963 and 12 in 1968 in the fabrication department (Exh. App. 48); that department included approximately 60 employees (see Exh. App. 58). The prefabrication departments, by contrast, were predominantly black (see App. 77-78). Most of the blacks in the fabrication departments continued to hold manual labor or cleaning jobs (Exh. App. 33, 48).

policy was racially discriminatory (App. 8, 32), and the court of appeals agreed (App. 75, 78).

In January 1968, the company began posting vacancies, although it continued not to provide written job descriptions (App. 21, 76). Then, according to the company, on November 14, 1968,[6] it developed and proposed the establishment of nine lines of progression. The union accepted and ratified the lines of progression in 1969 (J.A. 246-247). Six of these lines of progression are at issue before the Court.[7]

Each line of progression consisted of only two jobs. Apparently no employee was eligible for the "top" job in a line until he had worked at least one day in the "bottom" job.[8] According to the company,

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[6] Stipulations of fact adopted by the district court specify that the posting system was instituted on January 15, 1968 (App. 21). The stipulation does not identify the date on which the company proposed the nine lines of progression. In his opening statement at trial, counsel for the company said that "the[ ] lines of progression * * * were finally set up at a meeting in November 1968 * * *" (Tr. 34). Russell Penn Truitt, a member of the company's board of directors and director of manufacturing (Tr. 786, 789), testified at trial that the "lines of progression were established" (J.A. 570) at a meeting that was held on "November 14, 1968" (J.A. 571).

The court of appeals stated that the lines of progression were instituted in January 1968 (App. 143), but the court made no reference to the company's statements, and it was immaterial to the court's holding whether the lines were adopted in January or November of 1968.

[7] The district court held that the others did not violate Title VII (App. 31-32) and respondents do not now challenge this ruling.

[8] Two lines appear to have had alternative bottom jobs. See page 6, note 9 *infra*.

among employees who had worked in the "bottom" job the one with the most seniority within the plant would receive the "top" job (App. 142-143 n.3). Of the six lines at issue here, four consisted of nearly all-white "top" jobs from the fabrication departments linked with nearly all-white "bottom" jobs from the fabrication departments; the other two consisted of all-black "top" jobs from the prefabrication departments linked with all-black "bottom" jobs from the prefabrication departments.[9] The top jobs in the "white" lines of progression were among the best-paying jobs in the plants (Exh. App. 155-163). While it appears that more than two-thirds of the employees in the two plants were in a line of progression,[10] very few of these employees were in the

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[9] The lines of progression at issue here are (App. 21-22, 31-32):

1. Learner-adjuster (top)
   Packing or making machine operator, Schmermund boxer operator (bottom)
2. Examiner-making (top)
   Catcher (bottom)
3. Examiner-packing (top)
   Line searcher—Schmermund boxers (bottom)
4. Turbine operator (top)
   Boiler operator (bottom)
5. Adt dryer operator (top)
   Assistant adt dryer operator (bottom)
6. Textile dryer operator (top)
   Assistant textile dryer operator (bottom)

Both jobs in lines 5 and 6 were in the fabrication departments (Plaintiffs' Exh. 1), and both were all black (Exh. App. 160, 161, 171-172). All jobs in the remaining lines were located in the fabrication department and were nearly all white (Exh. App. 25-37, 46-48, 158-160).

[10] In 1973, 646 of the 952 hoursly-paid workers in the two branches were in the lines of progression. Only five of these employees were in the "black" lines. Exh. App. 158-162.

"black" lines (Exh. App. 158-161). At the Virginia branch, which was only 15% black (App. 34-35), approximately four times as many black employees as white employees were outside the lines of progression entirely. At the Richmond branch, which was one-third black (App. 35), approximately six times as many blacks as whites were outside the lines (see Exh. App. 158-162).

Between 1968, when the lines of progression were instituted, and 1973, when these actions were brought, there were approximately 30 vacancies in top jobs in the "white" lines of progression (Exh. App. 38-47). One of those vacancies was filled by a black; the other 120 top positions continued to be held by whites (see Exh. App. 158-161). The bottom jobs in these lines were also predominantly white, despite numerous vacancies (see Exh. App. 38-47, 158-161). No whites held jobs in the "black" lines (see Exh. App. 160-162). Segregation continued in other respects as well; in the two plants' prefabrication departments, for example, approximately 81% and 92% of the hourly-paid production workers were blacks (App. 19, 77).

2. On January 3, 1969, 50 days after the company proposed the establishment of the lines of progression, three black employees (including one of the private respondents) filed charges with the EEOC, alleging that they had been denied seniority and wage benefits because petitioners discriminated on the basis of race.[11] Copies of these charges were served on pe-

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[11] App. 102, 6-7. Exhs. A-1 to A-20 attached to the Commission's first request for admissions; company's response to the EEOC's first request for admissions.

titioners on February 19, 1969.[12] The Commission found reasonable cause to believe that petitioners' seniority, wage, and job classification practices had discriminatorily restricted blacks to low paying segregated jobs in violation of Title VII. When conciliation efforts failed, the Commission brought this action.[13]

After an extensive trial, the district court held that petitioners' seniority, promotion, and job classification practices violated Title VII (App. 8-9). The court found that petitioners maintained seniority and other employment practices which continued the segregation that had been explicitly enforced until 1963 (App. 32). In particular, the court ruled that the six lines of progression "perpetuated past discrimination on the basis of * * * race" (App. 32), and because petitioners offered no business justification for the six lines, the district court held that they violated Title VII and enjoined the company and union from using them further (App. 31-32, 57).

In 1976, the court of appeals affirmed.[14] It expressly endorsed the district court's finding that "after the effective date of Title VII the company and the union discriminated in the promotional policies

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[12] Exhs. B-1 to B-7 of Commission's first request for admissions; company's response to EEOC's first request for admissions; union's response to EEOC's first request for admissions.

[13] The EEOC also charged petitioners with sex discrimination. The district court upheld this charge (App. 8) and the court of appeals affirmed (App. 74). There is no need to consider the claim of sex discrimination in connection with the lines of progression at issue here.

[14] The court of appeals modified the district court's remedy (see App. 88, 91) in ways that are not relevant here.

of their bargaining agreements" (App. 78). In particular, the court agreed with the trial court that the six lines of progression, the rule requiring employees to forfeit their senority if they transferred between branches, the reliance on the subjective evaluations of white supervisors, and the failure to post written job descriptions all violated Title VII. With respect to jobs in the six lines of progression enjoined by the district court, the court of appeals noted that "[m]ost of these jobs were in the fabrication departments. Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority" (App. 78-79). In this respect, the court of appeals ruled, the lines of progression operated "in a manner similar to the [pre-1963] segregated departmental seniority rosters" (App. 79), permitting the company to carry forward segregated employment patterns. This Court denied a petition for a writ of certiorari. See 429 U.S. 920 (1976).

3. In 1977 petitioners moved to vacate the district court's 1974 decree.[15] Petitioners relied primarily on *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 353-354 (1977), which held that Section 703(h) of the Civil Rights Act, 42 U.S.C. 2000e-2(h), exempts certain bona fide seniority systems from the provisions of Title VII. Petitioners argued, among other things, that their seniority systems, including the six lines of progression, were bona fide and therefore not in violation of

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[15] The company and the union did not identify the basis for their motion. The court below treated petitioners' application as a motion under Rule 60(b)(5) of the Federal Rules of Civil Procedure (App. 137 n.1).

Title VII. The district court declined to modify its order, holding that petitioners' "seniority system * * * is not a bona fide system under *Teamsters* * * * because this system operated right up to the day of trial in a discriminatory manner * * * [and] had a discriminatory genesis" (App. 110).

A panel of the court of appeals agreed that "*Teamsters* requires no modification of the relief we approved with regard to job descriptions, lines of progression * * * or supervisory appointments" because those employment practices were not part of a seniority system and therefore did not fall within Section 703(h) (App. 116). The court of appeals then reheard the case en banc and held that "§ 703 (h) * * * has no application to [petitioners'] job lines of progression policy, whether or not it be considered a 'seniority system' * * * [because] [t]his policy was not in effect at American in 1965 when Title VII went into effect" (App. 142-143). The court of appeals concluded that the "legislative history of § 703(h) * * * demonstrates that Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date, and * * * to routine post-Act applications of such systems" (App. 143-144). Because the lines of progression were instituted in 1968 and thus did not create any pre-Act expectations, the court of appeals did not disturb the district court's injunction against the six lines of progression.[16]

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[16] The en banc court remanded for a hearing on, among other things, the bona fides of the rule that seniority was forfeited when an employee transferred between branches (App. 145-146, 147-154).

In dissent, Judge Widener, joined by Judge Russell, asserted that the lines of progression were established before the

SUMMARY OF ARGUMENT

I. The court of appeals' judgment is correct, but in our view its rationale is too broad. The court overlooked the distinction between the decision to *adopt* an aspect of a seniority system and the subsequent employment decisions made in *implementing* the system. Unlike the court of appeals, we believe that Section 703(h) protects applications of a seniority system even if the system, or the challenged aspect of the system, was instituted after the effective date of Title VII.

Respondents, however, filed a timely challenge to the adoption of petitioners' lines of progression. Section 703(h) does not immunize the decision to adopt an aspect of a seniority system, when that decision is properly challenged. By interpreting Section 703(h) to protect the application of a seniority system but not the decision to adopt an aspect of a seniority system, the Court can give full force to the language and policies of that Section without undermining the central purpose of Title VII—something Section 703(h) was never intended to do.

1. When petitioners instituted the lines of progression, they established a new qualification for the "top" jobs; no matter how senior he might be, an employee seeking a "top" job had to have served in a "bottom" job. Because the "bottom" jobs in the most desirable lines of progression had been deliberately reserved to whites, the decision to adopt the lines of progression "operate[d] to 'freeze' the status quo of prior discriminatory employment practices" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430

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effective date of Title VII (App. 161-177) and that Section 703(h) immunizes the post-Act establishment of seniority systems in any event (see App. 160 n.1).

(1971)), ensuring that virtually no blacks would be promoted to "top" jobs. Moreover, the lines of progression now at issue were not justified by a business necessity. It follows that permitting the lines of progression to be instituted would have been inconsistent with a central prohibition of Title VII—that employers and unions may not "limit * * * or classify" employees "in any way which would deprive or tend to deprive any individual of employment opportunities * * * because of * * * race" (42 U.S.C. 2000e-2(a)(2)).

2. At the same time, neither the language nor the purposes of Section 703(h) require that the decision to adopt the lines of progression be immunized. Although the distinction between adopting and implementing a provision of a collective bargaining agreement was established under the National Labor Relations Act, on which Title VII was modeled, Congress drafted Section 703(h) to protect only employment decisions made "pursuant to" a seniority system; the language of Section 703(h) does not cover the decision to adopt an aspect of a seniority system. The legislative history demonstrates that the principal purpose of Section 703(h) was to protect employees' seniority "rights"—that is, the expectations employees acquire on account of having worked for a period of time under a seniority system. A timely challenge to the decision to adopt a new aspect of a seniority system, such as respondents' challenge to petitioners' decision to institute the lines of progression, in no way threatens these expectations, for it occurs before legitimate expectations can develop. Indeed, it was the decision to adopt the lines of progression which prevented employees from using their seniority "rights" to obtain top jobs; in this way, respondents' challenge to the lines of progression

actually vindicated expectations based on the seniority system.

Petitioners assert that unless they are free to adopt such measures as the lines of progression policy without regard to the prohibitions of Title VII, they will be unable to adapt to changing circumstances. But the courts below did not impose any extraordinary limitation on petitioners. They merely required that petitioners justify the additional employment qualifications imposed by the lines of progression policy in the same way they would justify any other employment qualifications that served the same purpose of filling jobs with properly trained and experienced employees. Because employees had developed no expectations in the continued operation of the lines of progression policy, the circumstance that that policy was part of a seniority system should not excuse petitioners from having to show that the lines are not an artificial and unnecessary barrier to employment with a discriminatory effect on blacks.

There is, to be sure, substantial basis for concluding that Congress considered it inappropriate to require employers and unions to show a business necessity for using the seniority principle to reconcile members' conflicting interests and otherwise to organize the workplace. But the lines of progression at issue here do not serve any of these functions; rather, as petitioners acknowledge, they qualify the use of seniority in order to serve the same management needs as other employment practices that would undoubtedly be subject to the prohibitions of Title VII. There is, therefore, no reason to exempt the decision to adopt the lines of progression from those prohibitions.

II. The Court may also affirm the judgment of the court of appeals on the alternative ground that

the lines of progression policy is not bona fide and therefore not within Section 703(h). The district court, on the basis of its extensive familiarity with the case, held that the lines of progression policy was not bona fide; this holding was not questioned by the court of appeals and is strongly supported by the record.

Petitioners maintained explicit segregation until at least 1963. Under pressure from government agencies, they then modified their promotion practices, ostensibly giving black employees the opportunity to obtain jobs previously reserved for whites; but the new system they adopted depended heavily on the standardless, subjective evaluations of white supervisors. Consequently, the jobs previously reserved to whites continued to be held by whites. The district court and the court of appeals held that this promotion practice was racially discriminatory.

In 1968, petitioners, again under pressure from the government, shifted to the lines of progression policy. This policy had the predictable effect of continuing the same segregated employment patterns that had previously existed, essentially excluding blacks from the better jobs. In view of both the company's and the union's previous explicit commitment to segregation, and their previous choice of practices that would continue segregation in effect, there is a substantial basis for inferring that petitioners adopted the lines of progression practice at least in part because it would continue the segregated employment patterns.

Moreover, petitioners were unable to identify the business purposes served by the six lines of progression at issue here—despite having an opportunity, and every incentive, to do so at the first trial. Because the lines did not serve a business purpose, and

did serve an objective the company and union had long and persistently pursued—reserving the best jobs for whites—the district court was justified in concluding that the latter objective at least partially motivated the decision to adopt the lines of progression, rendering them not bona fide.

ARGUMENT

I. SECTION 703(h) DOES NOT BAR A TIMELY CHALLENGE TO THE POST-ACT ADOPTION OF AN ASPECT OF A SENIORITY SYSTEM

A. This Case Presents a Challenge to the Adoption, Not the Operation, of the Lines of Progression

1. While the judgment of the court of appeals was correct, its rationale, in our view, is too broad. Specifically, the court of appeals overlooked the distinction between a challenge to the *adoption* of a seniority system and a challenge to the system's *operation*. Contrary to the court of appeals, we believe that Section 703(h) applies to a challenge to the operation of an aspect of a seniority system, even if that aspect was instituted after the effective date of Title VII. But Section 703(h) should not apply to a timely challenge to the post-Act adoption of an aspect of a seniority system.

Respondents' claim is properly seen as a challenge to the adoption, not the operation, of the lines of progression. The company asserted that the lines were adopted on November 14, 1968, and the private respondents filed a charge with the EEOC before the statutory charging period elapsed.[17] Until the

[17] Respondents filed their charge within 50 days. At the time the private respondents filed their charge, Title VII generally required charges to be filed within 90 days of an alleged violation. 78 Stat. 260. Section 706(e), added in 1972,

district court enjoined their operation, the lines were applied in making various employment decisions, but those applications merely furnished additional evidence in support of the claim that the decision to institute the lines violated Title VII.

If respondents had not filed a timely challenge to the adoption of the lines of progression, and had instead challenged only subsequent promotion decisions made pursuant to the lines of progression policy, Section 703(h) would, in our view, apply to their claim. Such a claim could succeed only if the lines of progression were not part of a seniority system [18] or were not bona fide, even though the lines were adopted after the effective date of Title VII. But to interpret Section 703(h) to bar a timely challenge to the adoption of the lines of progression would thwart the basic purpose of Title VII without any sufficient justification in the language of Section 703(h) or the policies underlying that Section. Because respondents made a timely challenge to the

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now generally requires aggrieved persons to file a charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e). See generally *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980). This period should also apply here, because the private respondents' charge was pending with the EEOC on March 24, 1972, the effective date of the 1972 amendment. See, *e.g.*, *Hunter* v. *Westinghouse Electric Corp.*, 616 F.2d 267 (6th Cir. 1980). See also *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 241-243 (1976).

[18] In our view, the court of appeals panel was correct in its conclusion that the lines of progression policy was not an aspect of petitioners' seniority system. See pages 35-37, note 31 *infra*. Throughout this discussion, however, we shall, like the en banc court of appeals, assume arguendo that the lines of progression are part of a "seniority * * * system" within the meaning of Section 703(h).

adoption of the lines of progression, Section 703(h) does not require modifying the district court's injunction against the use of the lines.

2. By adopting the lines of progression, petitioners instituted a new qualification that had to be met by employees seeking one of the high paying "top" jobs formerly confined to whites. Irrespective of his seniority, and whatever his other qualifications, an employee had to have served in one of the "bottom" jobs. Because the "bottom" jobs were historically confined to whites as well, the new qualification imposed by the lines of progression predictably "operate[d] to 'freeze' the status quo of prior discriminatory employment practices" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971)); practically no blacks were promoted to the "top" jobs. This new qualification was "not justified by any business necessity" (App. 31-32).

These facts were found by the district court in 1974 and affirmed by the court of appeals in 1976, and petitioners do not appear to take issue with them here. It is a central policy of Title VII—" 'a policy that Congress considered of the highest priority' " (*Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); see *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976))—that an employer or union may not impose job qualifications which perpetuate the effects of past discrimination without serving a busines necessity. See *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-332 (1977); *Griggs* v. *Duke Power Co.*, *supra*.

Petitioners nonetheless assert that they should be allowed to reinstate the additional qualification imposed by the lines of progression policy. In particular, they claim that the lines of progression are

an aspect of a seniority system and are therefore protected by Section 703(h). But the language of Section 703(h) does not compel the result petitioners seek; moreover, no purpose of Section 703(h) would be served—and the central purpose of Title VII would be disserved—by permitting this result. Congress enacted Section 703(h) not to "narrow [the] application of * * * [T]itle [VII]" or undermine its basic objectives but only to "clarif[y] its * * * intent and effect." 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey); see *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977). Here Section 703(h) can be fully reconciled with the central purposes of Title VII by sustaining our challenge to the adoption of the lines of progression while not endorsing the court of appeals' more far-reaching assertions that Section 703(h) is inapplicable to the operation of any aspect of a seniority system if that aspect was instituted after the effective date of Title VII.[19]

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[19] If a seniority system is not bona fide, then not only its adoption but its application is unprotected by Section 703(h). See, *e.g.*, *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 353; *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364, 1378 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). The application of such a discriminatory system is a continuing violation which may be challenged as long as the violation persists. See *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 560 (1977). See also *Delaware State College* v. *Ricks*, 449 U.S. 250, 256-257 (1980); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 473 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). But if a seniority system is bona fide, then in our view Section 703(h) protects the application of the system, even if the system was instituted after the effective date of Title VII. In other words, because of Section 703(h), the application of a bona fide seniority system is not a continuing violation.

B. By Its Terms, Section 703(h) Does Not Exempt the Decision to Adopt an Aspect of a Seniority System from Title VII

1. Under the terms of Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2), petitioners' adoption of the lines of progression was clearly an unlawful employment practice. That section makes it illegal for an employer "to limit * * * or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race * * *." Section 703(c)(2), 42 U.S.C. 2000e-2(c)(2), applies essentially the same prohibition to unions. See also 42 U.S.C. 2000e-2(c)(3). Petitioners restricted eligibility for top jobs to those employees who had held the bottom jobs; in this way they "limit[ed]" employees and "classif[ied]" them in ways that directly "deprive[d] [and] tend[ed] to deprive" many of them of certain "employment opportunities." Because petitioners' decision to limit and classify employees in this way gave effect to past intentional discrimination, and served no business necessity, it was racially discriminatory under *Griggs* v. *Duke Power Co.*, *supra*.[20] See *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 141-143 (1977).

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[20] It is very likely that at the time the private respondents challenged the adoption of the lines of progression policy, that policy only limited their prospects and had not yet had a concrete effect on their wages or conditions of employment. But this did not bar their claim. Section 703(a)(2) refers to "classif[ications]" or "limit[ations]" which affect employment "opportunities"; it is not confined to employment practices or decisions which immediately affect wages or other specific benefits. "[T]he proper focus is on the * * * *discriminatory act*, not the point at which the *consequences* of the act become painful." *Chardon* v. *Fernandez*, No. 81-249 (Nov. 2, 1981) slip op. 2 (emphasis in original). Thus, for example, an

2. By contrast, the terms of the Section 703(h) exemption do not cover petitioners' decision to adopt the lines of progression. Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority * * * system * * *." This language addresses only decisions made "pursuant to" a seniority system; here, it would cover, at most, a decision not to promote a particular employee to a top job because he had not worked in a bottom job. The decision to adopt a senority system is, plainly, not a decision made "pursuant to" that system. See generally *Old Colony Trust Co.* v. *Commissioner*, 301 U.S. 379, 383 (1937). Moreover, in order to challenge the decision to adopt the lines of progression, we need not claim that petitioners were "apply[ing] different standards of compensation, or different terms [and] conditions * * * of employment"; under Section 703(a)(2), it suffices that the lines of progression policy classified and limited employees in a way that adversely affected their opportunities.

Congress could have drafted Section 703(h) to refer to decisions to adopt a seniority system, had it

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employee can—and sometimes must—challenge a decision denying him tenure even while he continues to work for his employer. See *Delaware State College* v. *Ricks*, *supra*. Similarly, active employees may challenge a discriminatory retirement plan. See, *e.g.*, *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1188-1189 (7th Cir. 1971). See also *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90, 94 (3d Cir. 1973). In any event, the adoption of a seniority system in a collective bargaining agreement binds employees in the bargaining unit, and in that sense has an immediate impact on them. See generally *Emporium Capwell Co.* v. *Western Addition Community Association*, 420 U.S. 50 (1975).

wished to do so. The National Labor Relations Act was the model for much of Title VII (see, *e.g.*, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11 420 & n.12 (1975)),[21] and the NLRA distinguisnes between the adoption of an unlawful term in a collective bargaining agreement and its subsequent implementation; the Court has held that the adoption may be an unfair labor practice, challengeable only within the statutory charging period, while its implementation is not. See *Local Lodge No. 1424, International Association of Machinists* v. *NLRB*, 362 U.S. 411 (1960). Moreover, members of Congress pointed out that the language of Section 703(a)(2) referring to the "limit[ing]" and "classify[ing]" of employees would cover seniority systems (see, *e.g.*, 110 Cong. Rec. 2726 (1964) (remarks of Rep. Dowdy)), but Congress did not extend Section 703(h) to "limitations" and "classifications"—only to differences in employment conditions that were the result of the application of seniority systems.[22]

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[21] See also 110 Cong. Rec. 7266-7267 (1964) (remarks of Sen. Ellender); EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 7-9 (1964); Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 431 & n.2 (1966).

[22] By its terms Section 703(h) applies only to employers, not to unions. In practice, Section 703(h) can operate to immunize unions as well; for example, Section 703(c)(3) makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section," so union involvement in a practice protected by Section 703(h) cannot by itself give rise to liability under Section 703(c)(3).

But it is nonetheless significant that Congress referred only to employers in drafting Section 703(h). The application of a seniority system, especially insofar as it affects terms and

Thus while Section 703(h) exempts actions taken in implementing a seniority system, nothing in Section 703(h) refers to the adoption or institution of a seniority system. Petitioners themselves emphasize (*e.g.*, Union Br. 11) Senator Dirksen's statement that the language of Title VII "received meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase" (110 Cong. Rec. 11935 (1964)). For these reasons, the only conclusion to be drawn from the language is that "the unmistakable purpose of § 703(h) [is] to make clear that the routine *application* of a bona fide seniority system would not be unlawful under Title VII." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977) (emphasis added).

C. Immunizing the Decision to Adopt an Aspect of a Seniority System from Timely Challenge Would Not Serve the Purposes of Section 703(h) and Would Thwart the Central Purposes of Title VII

1. The distinction between the adoption and the application of an aspect of a seniority system reflects important congressional policies. The legislative history shows that the central purpose of Section 703(h) was not to ensure that employees and unions could design and adopt whatever sort of seniority system they desired; rather, Section 703(h) was intended to protect the expectations employees acquired in the continued operation of a seniority system. In other words, Section 703(h) rests on a "congressional judg-

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conditions of employment, is the responsibility of the employer. By contrast, the decision to adopt a seniority system, or a particular aspect of it, is jointly made by the employer and the union. Thus Congress's reference to employers alone is further evidence that Section 703(h) was intended to cover only the application, not the adoption, of a seniority system.

ment * * * that Title VII should not * * * destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 353. A timely challenge to the adoption of a seniority system does not endanger this congressional policy, for it occurs before such expectations can develop.

Section 703(h) was added to the Civil Rights Act in response to criticism by opponents of the Act. See *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 352.[23] Those opponents repeatedly argued that "Title VII would undermine the vested rights of seniority" (110 Cong. Rec. 7206 (1964) (statement of Sen. Clark, quoting Sen. Hill)). The minority report of the House Committee that favorably reported the bill became the Civil Rights Act charged that Title VII would "seriously im-

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[23] Section 703(h) was not part of the bill passed by the House, H.R. 7152, 88th Cong., 2d Sess. (1964). See 110 Cong. Rec. 2804 (1964); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 759 (1976). That bill was sent directly to the Senate floor where it was filibustered; Senators Mansfield and Dirksen eventually submitted a substitute bill that broke the filibuster. See Vaas, *Title VII: Legislative History*, *supra*, 7 B.C. Indus. & Com. L. Rev. at 445. Section 703(h) first appeared as part of this substitute bill. 110 Cong. Rec. 11931 (1964). Senator Humphrey, one of the drafters of the substitute, explained that Section 703(h) did not alter the meaning of Title VII but "merely clarifie[d] its present intent and effect." 110 Cong. Rec. 12723 (1964); see *Franks* v. *Bowman Transportation Co.*, *supra*, 429 U.S. at 761. Thus, as petitioners implicitly acknowledge, statements of House proponents of Title VII about its effects on seniority, and statements made by Senate proponents before Section 703(h) was proposed, are evidence of the meaning of Section 703(h).

pair * * * [t]he seniority rights of employees in corporate and other employment * * *." H.R. Rep. No. 914, 88th Cong., 1st Sess. 64-65 (1963). Another opponent argued that under Title VII "benefits which organized labor has attained through the years would no longer be matters of 'right' * * *." 110 Cong. Rec. 486 (1964). Title VII, opponents charged, would "*destroy union seniority*" which was a "most valuable asset" (H.R. Rep. No. 914, *supra*, at 71; emphasis in original) and would undermine "established seniority" (110 Cong. Rec. 2726 (1964)). Opponents of Title VII outside Congress claimed that it would "place[] in jeopardy" the "seniority rights of union members." See 110 Cong. Rec. 9111 (1964).

The bill's defenders answered these charges in the same vein; they focused on employees' expectations about the continued operation of seniority systems. Thus the bill's supporters accused their opponents of attempting to "put [people] in fear about * * * seniority" by falsely suggesting that under Title VII "seniority systems would be abrogated and * * * white men's jobs would be taken and turned over to [blacks]." 110 Cong. Rec. 11471 (1964). This was "a cruel hoax * * * [that] generates unwarranted fear among those individuals who must rely upon their job or union membership to maintain their existence." 110 Cong. Rec. 9113 (1964). The chairman of the House committee that reported the bill said: "It has been asserted * * * that the bill would destroy * * * employee rights vis-a-vis the union and the employer. This again is wrong." 110 Cong. Rec. 1518 (1964) (statement of Rep. Celler). Other House proponents explained that "[T]itle VII * * * does not permit interferences with seniority rights of employees or union members." 110 Cong. Rec. 6566 (1964). The Senate managers, Senators Humphrey

and Kuchel, explained that "[t]he full rights * * * of union membership * * * will in no way be impaired" (110 Cong. Rec. 6549 (1964) (Sen. Humphrey)) and that "seniority rights [would not] be affected by this act" (110 Cong. Rec. 6564 (1964) (Sen. Kuchel)).

Perhaps the most "authoritative indicators of [the] * * * purpose [of Section 703(h)]" (*International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 352) are memoranda submitted during the Senate debate by Senators Clark and Case. The theme of those memoranda was that Title VII would not interfere with seniority "rights" or expectations based on seniority systems already established and in operation (110 Cong. Rec. 7207, 7213 (1964)):

> [I]t has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect.
>
> * * * * *
>
> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective.

Thus it seems clear that the principal purpose of Section 703(h) was to make explicit Congress's intention not to "destroy" the "rights" that employees acquired under seniority systems. That is, Title VII was not to interfere with employees' expectations that a seniority system, once lawfully instituted, would continue to operate.

This conclusion is subject to two qualifications. First, as we will explain (pages 30-31, *infra*), it cannot fairly be said that this was the only purpose of Section 703(h); Congress also recognized the important role that seniority plays in collective bargaining, and its historic importance to workers. Second,

while Section 703(h) did protect employees' seniority expectations to some degree, it did not insulate those expectations entirely from adjustment. It is well established, for example, that a violation of Title VII may be remedied by an "award of the seniority credit [a victim of discrimniation] presumptively would have earned but for the wrongful treatment" even if "such relief diminishes the expectations of other, arguably innocent, employees * * *." *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 767, 774.

Nonetheless, the legislative history shows that in passing Section 703(h) Congress's primary concern was with employees' expectations under seniority systems that were in operation. A timely challenge to the adoption of an aspect of a seniority system—such as respondents' challenge to the lines of progression—in no way impairs these expectations. Respondents challenged the lines of progression soon after they were established.[24] Petitioners were notified of

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[24] Judge Widener, dissenting from the en banc decision of the court of appeals, argued that the lines of progression were adopted before 1965. But Judge Widener made no reference to the company's explicit statement that the lines of progression were "set up" and "established" on November 14, 1968. See page 10, note 16 *supra*. In any event, Judge Widener's argument was simply that between 1963 and 1968, when company supervisors were using their discretion to decide whether an applicant for a job was "qualified," they would consider, together with a variety of other factors, the applicant's experience in other jobs in the plant (App. 162, 169). This cannot be enough to show that there were defined lines of progression that were an aspect of a seniority system. See *California Brewers Association* v. *Bryant*, 444 U.S. 598, 609-610 (1980) ("[A] standard that gives effect to subjectivity" "depart[s] significantly from commonly accepted concepts of

the challenge within six weeks.[25] Thus employees could not have justifiably relied on the continued existence of the lines of progression and developed legitimate expectations based on the lines.[26] See *Oc-*

'seniority.' "). If Judge Widener's approach were correct, an employer could extend Section 703(h) immunity to any criterion simply by showing that it had previously entered into discretionary employment decisions in some way.

[25] Under Section 706(b) of Title VII (42 U.S.C. 2000e-5(b)), added in 1972, notification of a charge must be served on the employer and union within 10 days of its receipt by the EEOC. Before 1972, the EEOC was only required to serve notice within a reasonable time. See *Chromocraft Corp.* v. *EEOC*, 465 F.2d 745 (5th Cir. 1972).

[26] Some expectations based on the lines of progression may, of course, have arisen between the challenge and the conclusion of the litigation. But this is an unavoidable risk; until the litigation runs its course, timely notification of the challenge to the lines of progression is the only possible means of preventing employees from acquiring unjustified expectations. The Court has held that Congress relied on such notification to ensure that litigation delays would not be unfair. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 372-373 (1977).

Moreover, Congress intended the EEOC to delay initiating litigation until it had investigated the charge and attempted conciliation. See *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 359-360, 368. Voluntary settlement and conciliation are "the preferred means" of resolving employment discrimination claims (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); see *Carson* v. *American Brands, Inc.*, No. 79-1236 (Feb. 25, 1981), slip op. 8 n.14), and a principal objective of Title VII is to " 'spur * * * employers and unions to self-examine and to self-evaluate their employment practices * * *.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975), quoting *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). Had petitioners done so, or had they been willing to conciliate with the

cidental Life Insurance Co. v. *EEOC*, 432 U.S. 355, 371-372 (1977).

In fact, when the lines of progression were established they interposed additional qualifications which had to be met by employees seeking to use their seniority to obtain a better job. Before the lines were instituted, employees with plant seniority could look forward to obtaining one of the top jobs; when the lines of progression were adopted, employees—black and white alike—found that less senior employees who had served in bottom jobs would obtain the top jobs instead. In this way, the decision to adopt lines of progression frustrated existing seniority expectations. Respondents' challenge to that decision actually helped restore previously existing expectations. Thus once respondents' claim is seen as a challenge to the adoption, not the operation, of the lines of progression policy, there is no basis for suggesting that it is inconsistent with the purpose of Section 703(h).

2. Petitioners assert (*e.g.*, Union Br. 31; Company Br. 30, 32) that unless Section 703(h) is interpreted to permit them to reinstate the lines of progression, their ability to determine who should be

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respondents, no unwarranted expectations would have developed.

In any event, the danger that employees acquired unwarranted expectations in the continued operation of petitioners' lines of progression is far less than the danger that a seniority system that is not bona fide will create such expectations, since such a system may operate for years without being challenged; yet Congress clearly intended to permit challenges to aspects of seniority systems that were not bona fide. Moreover, courts retain the power to shape seniority relief in a way that avoids inequity. See *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 770.

promoted—and otherwise to alter plant operations in response to changing circumstances—will be excessively and unjustifiably restricted. But the courts below did not impose any extraordinary or unprecedented limitation on petitioners.

Petitioners' lines of progression policy specifies that, as an additional prerequisite or qualification for holding a "top" job, an employee must have held the designated "bottom" job. The effect of denying petitioners the benefit of Section 703(h) was only to require that they justify this policy in the same way they would justify any other employment qualification—by showing, under *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431, that that qualification is not an "artificial, arbitrary, and unnecessary barrier[] to employment * * * which operates to exclude [blacks and] cannot be shown to be related to job performance."

For example, in order to serve the same purposes as the lines of progression policy, petitioners might have specified that as a prerequisite to obtaining certain jobs an employee must have experience in a designated job *outside* the company, or must have completed a training program, or must demonstrate certain aptitudes, or must have a vocational school diploma. All of these requirements would be subject to *Griggs*. See, *e.g.*, *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 221-222 (5th Cir. 1974) (high school diploma); *United States* v. *Hayes International Corp.*, 456 F.2d 112, 118 (5th Cir. 1972) (prior experience). Petitioners do not explain why it is unreasonable, or in conflict with a purpose of Title VII or Section 703(h), to require the same justification for the employment qualifications established by the lines of progression policy.

It is not a sufficient answer that the lines of progression policy is an aspect of a seniority system.

We can discern only two reasons Congress might have had for requiring a weaker justification for an employment practice that is an aspect of a seniority system, and neither of those reasons is applicable here.

First, as we have explained, Congress did not want Title VII to "destroy or water down the vested seniority rights of employees simply because * * * [the] seniority system * * * perpetuate[d] [past] discrimination." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 353. Congress may have been concerned about the employee who worked for years in a bottom job with the expectation that by doing so he would improve his chances of obtaining a top job. But, as we have said, this concern is not material here, for petitioners' lines of progression were challenged when they were adopted, before any such expectations could develop.

The second possible reason for requiring a lesser justification for an aspect of a seniority system is that the seniority principle—'that preferential treatment is dispensed on the basis of some measure of time served in employment" (*California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 606) and that "longevity with an employer" is "reward[ed]" (*Alabama Power Co.* v. *Davis*, 431 U.S. 581, 589 (1977))—is of "overriding importance" in collective bargaining and in the organization of the workplace. *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964); see *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 79 (1977); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962). In considering Title VII and Section 703(h), Congress recognized that unions almost universally use seniority to allocate scarce benefits among their members. See, *e.g.*, H.R. Rep.

No. 914, *supra*, at 71. The seniority principle is thus often vital to a union's efforts to aggregate and reconcile the conflicting interests of those it represents (see, *e.g.*, Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1604 (1969))—a central aspect of a union's role under the federal labor laws. See *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338-339 (1953).

Accordingly, Congress may well have believed that to require a union to show that seniority serves a business necessity would undermine one of the central institutions of collective bargaining. Specifically, the business necessity requirement is not well suited to justifying the use of the seniority principle itself—that is, length of service—as a criterion. See generally *Jersey Central Power & Light Co.* v. *Local 327, IBEW*, 508 F.2d 687, 705-710 (3d Cir. 1975). The principal justification for using seniority as a criterion lies in tradition, and in employees' general willingness to accept it as a fair basis for allocating scarce benefits. See, *e.g.*, Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1604-1605.

This case, however, does not concern a union's role in reconciling employees' conflicting interests by using a measure that is generally accepted as legitimate; nor does it involve dispensing preferential treatment "on the basis of * * * time served in employment," *California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 606. The lines of progression are a constraint that was imposed on the use of seniority in order to serve management objectives. Petitioners virtually concede as much, arguing that the "narrow-[ing]" of seniority by such means as the lines of progression policy is needed to achieve management's

goal of promoting the more qualified employees (see Union Br. 30; Company Br. 28-29); it is in any event obvious that any justification for the lines of progression must invoke management's needs for qualified employees, not the union's interests.

We know of nothing suggesting that Section 703(h) was intended to allow a policy that limits the use of seniority in order to serve the same management objectives as other employment qualifications to be justified more easily than other qualifications.[27] Indeed, it is fair to say that in enacting Section 703(h) Congress was almost exclusively concerned with the importance of seniority to unions and employees, and scarcely mentioned employers' interests in incorporating rules into seniority systems. See, *e.g.*, 110 Cong. Rec. 6549, 6553-6554, 11486, 11768, 11848 (1964); H.R. Rep. No. 914, *supra*, at 71.

We recognize, of course, that "[s]eniority systems, reflecting as they do, not only the give and take of

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[27] The legislative history includes such statements as "nothing in the bill would affect any seniority plan which was not a cloak for racial or religious discrimination" (110 Cong. Rec. 5423 (1964) (remarks of Sen. Humphrey), quoted at Union Br. 16), but it is clear that by "discrimination" the proponents of the Act meant the sort of discrimination outlawed by *Griggs*. For example, in the same speech in which he made the statement just quoted, Senator Humphrey said that the bill "does not limit the employer's freedom to hire, fire, promote, or demote for any reason * * *—so long as his action is not based on race" (110 Cong. Rec. 5423 (1964)). Indeed, the proponents of the Act often linked management practices to seniority systems, explaining that both would be unlawful if discriminatory and lawful if nondiscriminatory. See, *e.g.*, 110 Cong. Rec. 5094 (1964) ("An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of his race or religion. Similarly, the law will have no effect on union seniority rights.").

free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes," and that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems" (*California Brewers Association* v. *Bryant*, 444 U.S. 598, 608 (1980)). When employees have developed expectations based on "those components of [a] * * * seniority scheme that, viewed in isolation, [do not] embody or effectuate the principle that length of employment will be rewarded," there is good reason to "exempt [those components] from the normal operation of Title VII * * *." *Id.* at 607. Thus to the extent that petitioners' lines of progression are bona fide, and are an aspect of their seniority system, the "routine application" (*International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 352) of the lines of progression will be protected by Section 703(h), because those lines of progression may have given rise to employees' expectations. Moreover, even when the adoption of a seniority system is challenged, there may be aspects of the system—notably the very use of the seniority principle—to which it would be inappropriate to apply the "business necessity" requirement as it has been developed in other contexts.

Here, however, respondents have challenged the adoption of an aspect of a seniority system that resembles any other job qualification and that gave rise to no legitimate expectations. If the six challenged lines of progression are "related to job performance" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431), petitioners should be able to show that they are—just as they were able to show that the other three lines served a business necessity (App. 31-32). See *Furnco*

Construction Corp. v. *Waters*, 438 U.S. 567, 577 (1978). But there is no reason to allow employees and unions to adopt "artificial, arbitrary, and unnecessary barriers to employment" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431) merely because those barriers "have some nexus to an arrangement that concededly operates on the basis of seniority" (*California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 608).

3. Petitioners (*e.g.*, Union Br. 28-31; Company Br. 27-31) and amicus (Am. Br. 15, 20 n.18)[28] also argue that unless the lines of progression are immunized from Title VII, employers and unions will be unable to adopt any change in their seniority practices, even a change that would favor minorities, for fear that the entire seniority system will then be challenged as not being sufficiently favorable to minorities (see, *e.g.*, Union Br. 18). Neither we nor the court of appeals suggests that the addition of a single feature—such as the lines of progression—to a seniority system deprives every other aspect of that system of the protection of Section 703(h). The court of appeals carefully distinguished between the lines of progression policy, which it held was not covered by Section 703(h), and the rule providing that an employee forfeited his seniority when he transferred between branches—a rule which the court specifically held was protected by Section 703(h) and therefore was lawful unless not bona fide. App. 142, 145. A challenge to the adoption of an aspect of a seniority system draws into question only that aspect, not other features that were adopted long before. See *California Brewers Association* v. *Bryant*, *supra*, 444

[28] "Am. Br." refers to the brief of Amicus Curiae Equal Employment Advisory Council.

U.S. at 610-611.[29] Similarly, if an aspect of a seniority system is changed, the question raised by a timely challenge to the change is whether that change violates Title VII; the change would not make the entire system liable to reexamination.[30]

II. PETITIONERS' LINES OF PROGRESSION ARE NOT A BONA FIDE ASPECT OF A SENIORITY SYSTEM

Section 703(h) "does not immunize all seniority systems. It refers only to 'bona fide' systems * * *." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 353. Thus if petitioners' six lines of progression are not a bona fide aspect of their seniority system, the district court was correct in refusing to modify its original injunction against the lines.[31]

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[29] See Brief for the United States and the EEOC as amici curiae in *Pullman-Standard* v. *Swint* and *United Steelworkers of America* v. *Swint*, Nos. 80-1190 and 80-1193, at 9-10. A copy of this brief has been sent to counsel for the other parties.

[30] Moreover, Section 703(h) does not even become relevant unless a properly challenged aspect of a seniority system has a disproportionately harmful effect on minorities. If a new aspect of a seniority system, or a change in that system, has the effect of favoring minorities in order to overcome prior discrimination, that new aspect does not violate the substantive prohibitions of Title VII even if it is not justified by a business necessity. There is thus no basis for petitioners' suggestion that the Section 703(h) exemption is needed to protect the efforts of employers to modify their employment practices so as to overcome prior discrimination; such efforts are protected because they are not proscribed by any provision of Title VII. See *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979).

[31] We also agree with the court of appeals panel that the lines of progression policy was not an aspect of a seniority system, and is not within Section 703(h) for that reason as

The district court held that the lines of progression were not bona fide. Although they decided the case on different grounds, the court of appeals panel

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well. The lines of progression policy did not establish units within which seniority was calculated; the seniority units were the two branches, and the amount of time an employee had spent in a line of progression was irrelevant to his seniority. In this respect the lines of progression policy was unlike the distinction between city and over-the-road drivers involved in *International Brotherhood of Teamsters* v. *United States*, *supra*; unlike the distinction between temporary and permanent employees at issue in *California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 609; and apparently unlike the usual line of progression seniority scheme (see, *e.g.*, *United States* v. *Georgia Power Co.*, 634 F.2d 929, 931 (5th Cir. 1981), petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117; Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1602).

Similarly, the lines of progression policy does not "delineate how and when the seniority time-clock begins ticking, * * * specify how and when a particular person's seniority may be forfeited, * * * [or] define which passages of time will 'count' towards the accrual of seniority and which will not." *California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 607 (footnotes omitted). Nor does it "particularize the types of employment conditions," such as "vacation time * * * job security in the event of layoffs, * * * promotions or job assignments" that "will be governed or influenced by seniority." *Ibid.* & n.20.

Moreover, the lines of progression policy, again unlike the distinction at issue in *California Brewers Association*, does not "focus[] on length of employment" (444 U.S. at 610). Apparently one day's service in a bottom job was as much benefit to an employee as 40 years' service. The only thing distinguishing the lines of progression from, for example, an "educational prerequisite"—which clearly cannot be an aspect of a seniority system (see *id.* at 609)—is that the qualifications required by the lines of progression policy could be obtained only by working in petitioners' plant. But this alone cannot justify treating a rule as an aspect of a seniority system; many other criteria, clearly not aspects of a seniority

and the en banc court of appeals did not question this holding. The district judge had presided over a lengthy trial at which the genesis and impact of the lines of progression, and the possible business justifications for them, were thoroughly explored. Because of the district judge's familiarity with the case, his conclusion that the lines of progression were not bona fide is entitled to some deference. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 535 n.8 (1979). Moreover, the record strongly supports the conclusion reached by the district judge. In these circumstances, the Court may wish to affirm the judgment of the court of appeals on the alternative basis that the six lines of progression are not bona fide. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977); *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 & n.6 (1977); *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 & n.6 (1970).

An aspect of a seniority system "cannot be bona fide if an intent to discriminate entered into its very adoption." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 346 n.28. See, *e.g.*, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977); *United States* v. *Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117; *Hameed* v. *International Association of Bridge Workers, Local 396*, 637 F.2d 506, 516 & n.11 (8th Cir. 1980).[22] Petitioners concede that until 1963

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system—such as certain aptitude tests (see *ibid.*) or a supervisor's evaluation (see *id.* at 609-610)—might be capable of being satisfied only by an employee who had already worked in the employer's plant.

[22] In our Brief for the United States and the EEOC as Amici Curiae in *Pullman-Standard* v. *Swint* and *United Steelworkers of America* v. *Swint*, Nos. 80-1190 and 80-1193, we discussed the criteria for determining whether a seniority

the plants were explicitly segregated along racial lines in every significant respect. Promotions were determined by seniority, but petitioners prevented senior blacks from obtaining the better-paying fabrication jobs by adopting a rule that strongly discouraged transfers from the prefabrication departments —which had been deliberately kept predominantly black—to the fabrication departments, in which all but the least desirable jobs were reserved for whites.

In 1963, petitioners, under pressure from government agencies, dropped this seniority rule and maintained only the rule that an employee forfeited his seniority when he transferred between branches. On its face, this new system seemed to promise that some blacks could use their seniority to be promoted into jobs previously reserved for whites. But petitioners modified the seniority system with a system of "qualifications" that relied heavily on the standardless, discretionary evaluations of white supervisors—the sort of subjective decisions that have proved to be a recurrent source of racial prejudice. See, *e.g.*, *Alexander* v. *Louisiana*, 405 U.S. 625, 631-632 (1972); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358-359 (5th Cir. 1972). Not surprisingly, this new promotions policy replicated the employment patterns achieved by the explicitly racial regime. The district court and the court of appeals found that this promotions policy, too, was racially discriminatory.

In 1968, petitioners again came under pressure from government agencies,[33] and again they modified

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system is bona fide under Section 703(h) and the relationship between those criteria and the proof of discriminatory purpose under the Equal Protection Clause.

[33] EEOC representatives were involved in inducing the company to change its employment practices in 1968. See J.A. 570-572. The EEOC did not approve the specific measures

their promotion policy. This time the restriction they placed on the pure use of plant seniority was the lines of progression. Because of the lines of progression, four of the most desirable jobs in the plant—previously all-white jobs—were reserved to employees who had served in other traditionally white jobs. This policy also had a predictable effect; after five years and numerous vacancies, the top jobs remained almost exclusively white. See page 7, *supra*. At the same time, between four and five times as many blacks as whites were excluded from the lines of progression entirely, even though the company employed four times as many whites as blacks (see pages 6-7, *supra*; App. 75). In this way, the lines of progression "fostered [a] racially stratified job environment[] to the disadvantage of minority [employees]" (*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973)). "[W]hen the adverse consequences of [an action] upon an identifiable group are [clearly] * * * inevitable * * * a strong inference that the adverse effects were desired can reasonably be drawn." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 n.25 (1979). See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *Washington* v. *Davis*, 426 U.S. 229, 241-242 (1976). Here, the persistent racial pattern, and the obvious and predictable segregative consequences of the lines of progression, create a strong inference that petitioners adopted the lines in order to maintain that pattern.

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adopted by the company (see 42 U.S.C. 2000e-12(b); 31 Fed. Reg. 10270 (1966)), and there is no indication that the EEOC was aware of the effects of the lines of progression (see J.A. 572), so the EEOC representative's presence at discussions is not evidence that the lines of progression are bona fide.

Notably, both the company, which proposed the lines of progression, and the union, which ratified them, had an extensive history of discriminatory practices. This suggests the presence of impermissible racial purposes. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 267; *Sears* v. *Bennett*, 645 F.2d 1365, 1370-1371, 1373-1374 (10th Cir. 1981), petition for cert. pending *sub nom. United Transportation Union* v. *Sears*, No. 81-221. While the union had merged its segregated locals—under direct pressure from government agencies (App. 75; J.A. 202)—white members dominated the merged union. Thus there is no sufficient reason to believe that the collective bargaining process, which would ordinarily protect employees' interests, adequately protected the interests of black employees in this instance. The more reasonable conclusion is that the union and the company agreed on a policy that would continue the pattern of guaranteeing that senior white employees would receive the best, traditionally white jobs. At the very least, in view of the care with which both the company and the union had always preserved the best jobs for white employees, it is difficult to quarrel with the district court's apparent conclusion that petitioners adopted the lines of progression "at least in part 'because of,' not merely 'in spite of' " the fact that they were likely to continue to give the best jobs to whites. See *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279.

If the lines of progression policy served some substantial legitimate interest, it would be more difficult to conclude that race entered into the decision to adopt them. But petitioners established no business justification for the lines. At the trial, petitioners had every incentive to show that the lines of

progression served a business interest.[34] Although petitioners established that three lines of progression served a business necessity, they offered essentially no business justification for the six lines at issue here (App. 9). The district court accordingly found, in effect, that the six lines do not "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 425, quoting *McDonnell Douglas Corp.* v. *Green, supra*, 411 U.S. at 801. See *Dothard* v. *Rawlinson, supra*, 433 U.S. at 329. Thus it is difficult to escape the conclusion reached by the district court, that the lines of progression were in fact intended to serve the racially segregative objectives that the company and union had repeatedly pursued through a variety of other means.[35]

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[34] The issue at trial was not whether the lines of progression were bona fide but whether they were "related to job performance" within the meaning of *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431. While the *Griggs* standard is different from the test that would be used to determine if the lines of progression were bona fide (see *Dothard* v. *Rawlinson, supra*, 433 U.S. at 328; *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 335-336 n.15), every plausible justification for the lines of progression would also have helped petitioners meet the *Griggs* test.

[35] The explanation which petitioners did offer for the six lines of progression is revealing. A company manager testified that the lines were not the result of any formal studies or any documentary evidence but simply of informal management views developed "over the years" (J.A. 224-225). In short, the lines of progression reflected the same kind of standardless supervisory judgments that were used—and were held to be discriminatory—before the lines of progression were adopted. See also pages 26-27, note 24 *supra*. Moreover, the manager's testimony reinforces the district court's

For these reasons, this Court can affirm the judgment of the court of appeals on the alternative ground that the district court correctly held that the lines of progression were not bona fide and therefore not within Section 703(h).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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implicit conclusion that the lines of progression were chosen because they were another means of maintaining the traditional employment patterns at petitioners' plants.

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